

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

77-1293

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

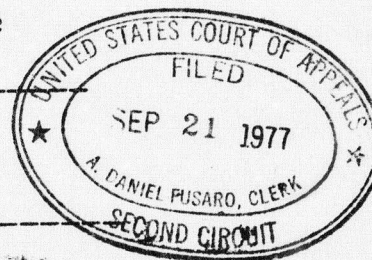
-against-

STANLEY FORSACK,

Defendant-Appellant.

*On Appeal From The United States District
Court For The Eastern District of New York*

APPELLANT'S REPLY BRIEF



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 (June 1977)
- 2) MASSIAH v. U.S. 377 U.S. 201 (1964)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

STANLEY FORSACK,

Defendant-Appellant.

This memorandum is submitted in reply to the arguments submitted in appellee's brief.

POINT I

THE POINTS RAISED ON APPEAL WERE RAISED BY APPELLANT
IN THE COURT BELOW.

Appellee urges that the motion to suppress statements in the court below was made solely on the basis of "involuntaries". Appellee urges that "...for the first time on appeal..." appellant seeks suppression of the statements made upon constitutional grounds (p. 13, Appellee's brief). Examination of the motion papers in the court below (p. 8a, Appellant's Appendix) reveal such statements not to be true. The notice of motion sets forth that the basis upon which appellant moves is that such statements were "... involuntarily made and were secured in violation of defendant's rights under the constitution of the United States."

(Emphasis supplied)

Further, appellee urges that appellant's argument to the effect that such statements were obtained, in violation of appellant's constitutional right to counsel were not raised in the court below and therefore should not be considered here. (p. 15,

Appellee's Brief). Examination of the trial transcript reveals this not to be true. (pp. 31-32 Trial Transcript).

By his questions, appellant's counsel was not idly attempting to encumber the record. Counsel was attempting to elicit information as to whether Forsack's then counsel had been consulted concerning "cooperation", so that argument could be had prior to the court's rendering a decision on the suppression hearing. However, as the record clearly reveals, the court had its mind made up, and never even asked counsel to present argument after the close of testimony. (p. 102, line 21-22, Trial Transcript)

It is thus clear that the arguments raised by appellant in its brief, were unsuccessfully presented to the court below and are the proper subject of appellate review.

POINT II

THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

As to the substantive grounds of appellant's presentation concerning the suppression hearing, appellee urges that there is no reason to believe that the agent's offer (of an auto ride back to Floral Park) was designed to give them an opportunity to question appellant alone. (p. 16 Appellee's brief) Said argument does not hold water. The record reveals that the "cooperation" question was pretty well resolved in the auto ride back to Floral Park. Agent Roger's testimony in this regard is quite revealing. (p. 33 Trial Transcript)

"ROGERS-Cross

Q And did the question of cooperation come up on October 28th?

A No, by October 28, I had it pretty well resolved, he was going to cooperate.

Q And he began to cooperate?

A Yes.

Q Overnight, in other words, he made the decision to cooperate?

A I believe he made it on the way back to Floral Park.

Q Did he give you any information on the way back to Floral Park?

A Well, as I testified before, I believe he might have given the card of this fellow, Victor Accedeno on the way back, I'm not sure. It was either on the 27th or 28th he gave me the card."

The appearance of Forsack at the ATF office was icing on the cake and a foregone conclusion in the mind of Agent Rogers, when he dropped Forsack off on the evening of October 27th.

It is further submitted that the entire course of conduct of the ATF agent was unfair and calculated to deprive appellant of his constitutional rights. It is significant that on November 3, 1976, only six days after the arrest, and prior to the time that appellant had the opportunity to consult with his assigned counsel, an Assistant U. S. attorney from another District called Mr. Weinbach to request permission to put Mr. Forsack before the Grand Jury in connection with the Accedeno prosecution. (pp. 93-94 Trial Transcript). Apparently the "cooperation" supplied by Forsack

in the October 28th meeting was of more than passing interest to Agent Rogers and the Syracuse office of ATF. Mr. Weinbach further testified that he recommended to this unidentified assistant U.S. attorney that he wait until Forsack "completed" his cooperation. (Emphasis supplied) Just what the term "completed his cooperation" means was not further developed, but it is obvious that such term goes beyond

a) questioning appellant as to the source of the guns so that he (Rogers) could determine whether the suppliers of the guns were in violation of Federal laws, (as urged by appellee at p. 12 of its brief), or as put in another way in appellant's brief, (p. 17, Appellee's brief)

b) "... Rogers questioned him as to where he had acquired the guns. Rogers testified that the purpose of seeking this cooperation was to obtain information about other persons violating the Gun Control Act, Not to obtain incriminating statements. (Emphasis supplied)

If, as urged by appellee, such was the only purpose of eliciting "cooperation" from Forsack, then the meeting of October 28th would have sufficed. Because all such information was disclosed at that meeting.

But, as the testimony developed, the October 28th meeting was only one of several post arrest meetings during which Forsack's "cooperation" was elicited. Put succinctly, Rogers enlisted the

"cooperation" of Forsack to, among other things, become an "informer", for Rogers. It is submitted that one of the things promised by Rogers (which may or may not have been within his province to promise) was that Forsack would not be prosecuted for the crime for which he had been arrested (for as long as he "cooperated"). This state of facts was vehemently denied by Rogers, but it certainly makes the events testified to (pp. 33-36, 37-40, Trial Transcript) more plausible. Certainly Mr. Weinbach would not have been aware of such promises, since he was not privy to such conversations.

However, appellee's explanation of the purpose of the October 28th meeting must have been made with tongue in cheek. Of course the purpose of such meeting was to gather incriminating evidence against appellant and to forestall the possibility of an "entrapment" defense. If we examine, p. 35 of appellee's brief, lo and behold we find the statement, "Appellant's sales... and his purchase of weapons to sell to the agents are also indicative of predisposition." Thus the appellee, it must be presumed, intended to utilize the evidence as to purchases, in order to furnish evidence to a jury as to appellant's predisposition. And that is just how it was presented to the jury.

Although appellee seeks to gloss over an apparent discrepancy in testimony between Agent Rogers and Assistant U. S. attorney Weinbach (see note, p. 11 Appellee's Brief), it is submitted that such discrepancy points up the lack of fair play and traditional notions of justice which tainted the prosecution herein.

On direct, Agent Rogers' testimony is revealing:

P. 7 Q "What happened once you arrived in Brooklyn?

A. I took him up to Mr. Weinbach's office.

At P. 8

Q. What happened at the office?

A. Well, actually, it was outside in the hallway, and Mr. Weinbach advised him again of his constitutional rights, and tried to elicit his cooperation as to the source of the guns.

He also told him that at that time, the undercover buys were made by undercover agents, obviously, which Mr. Forsack at that time, had a change of heart and did indicate he would cooperate with me."

No doubt this whole course of conduct was also part of the "showmanship" of the ATF agents, participated in by the U.S. attorney's office. It is respectfully submitted that such pre-arraignment conference to discuss "cooperation" was a violation of constitutional rights. BREWER v. WILLIAMS U.S. , 97 S. Ct. 1232 (June, 1977) and, it is respectfully submitted, that Agent Rogers' testimony as to the time of the conference clearly establishes that same took place, pre-arraignment. That is the reason assigned why Forsack experienced a change of heart and agreed to cooperate, according to Rogers.

It is further apparent that before the "promise" to make Forsack's cooperation known to a "sentencing judge" could become operative, Mr. Forsack would have to plead guilty to some crime. If, as Mr. Weinbach testified, the "cooperation" conversation took

place post arraignment, in the presence of assigned counsel, it must be assumed that Mr. Kelly, a competent and skilled defense attorney, would have at least ascertained or inquired as to what crime his client was going to be asked to plead to. Further, is there any explanation or information given to defendant as to the effect or consequences of such a guilty plea. It is respectfully submitted that there is not a scintilla of such evidence and the record is barren on both scores. The reason the record is barren is because no such post arraignment discussion took place. Mr. Weinbach's recollection is, at best, faulty. The interrogation prior to arraignment was in violation of defendant's rights; the continuing discussion in the car ride back to Floral Park was likewise a violation of defendant's constitutional rights; the making of the next day appointment was a violation of such rights, because the right to counsel had attached at the moment of arrest. Defendant did not knowingly and wilfully and voluntarily waive his right to the presence and advice of counsel. BREWER v. WILLIAMS, supra; MASSIAH v. U.S. 377 U.S. 201. In Massiah, the court specifically held that, as here, the interrogation need not be a "custodial" interrogation. In Massiah, as here, defendant was out of jail. (In the instant case, defendant was free on his own recognizance). The lower court in its opinion overlooked this when it stated that "there was no custodial interrogation."

POINT III

THE LOWER COURT ERRED IN FAILING TO CONDUCT AN INVESTIGATION, IN CAMERA, AS TO THE EXISTENCE AND AVAILABILITY OF THE INFORMER.

The lower court, it is submitted, should have conducted an, in camera, investigation as to the existence of an informer in the case. It should not have summarily denied the defense request for the name and address of such an informer. It could thus have been in a position to either grant or deny the request upon some logical basis. Appellee seeks to justify such refusal by arguing that appellant made no showing that the informant's testimony would be relevant or helpful at trial. Appellant was not given such opportunity.

Not having disputed appellant's version of the manner in which the identity of the informer was made available to the defense (p. 17 appellant's brief), it must be assumed that appellee accepts defense counsel's version of the facts. It is respectfully submitted that disclosure of the identity and business address of the informer on the Friday afternoon prior to Easter Sunday, when the trial of this cause was to proceed at 9:30 A.M. the following Monday is not fair play.

Appellee further argues that "the informant was not in the government's control," and the government therefore had no obligation to produce him. It is respectfully submitted that a "registered" informant, who receives expense money from the ATF agents can certainly be considered to be in the government's control.

As to the materiality and relevancy of the informant's testimony, one need only examine appellee's brief, p. 34, to establish such relevancy. On the issue of predisposition, raised by defendant in his entrapment defense, appellee argues,

1) Agent Rogers testified that the informant had told him (hearsay) that he had heard that appellant was engaged in illegal trading of guns.

2) The informant then had a conversation with appellant in which appellant mentioned he had guns available.

3) At that point, Agent Rogers asked the informant to introduce an ATF agent.

4) Thereafter, the informant arranged to bring the undercover agent to the store where appellant worked.

5) The informant participated in the first transaction.

Along with the other issues raised by appellant in the main brief, it is quite apparent that informant's testimony was most relevant and material to the issues and should have been produced by the government.

In the within case, as set forth in appellee's brief, the main evidence which the government contends establishes predisposition, came from or through the informer, who was not produced by the government. Agent Rogers only testified as to what the informant told him. He was not a party to the transactions.

On this basis the judgment of conviction should be reversed;

POINT IV

THE EVIDENCE LOGS WERE NOT PRODUCED.

It is apparent that the evidence logs were not produced. Agent Rondello testified as to procedures and testified that he filled out the evidence log which contained the signature of the custodian of the Evidence Room. The documents called "Property Reports" produced by Agent Rogers contain no such signature. As such, they are not even true and exact copies. The appellee contends that Agent Rogers complied in good faith with appellant's demand for production of the evidence logs. It is respectfully submitted that Agent Rogers very well knew what was requested and failed or refused to produce same. Appellee speculates that the evidence logs themselves would not sustain appellant's position (See Note 44, p. 33 Appellee's Brief).

That is just speculation. When defendant's liberty and life is at stake, one cannot afford the extravagance of indulging in speculation. It is respectfully submitted that the failure to produce the evidence log or entry log requires reversal.

Respectfully Submitted,

ROGER W. KOHN
Attorney at Law

KOHN

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

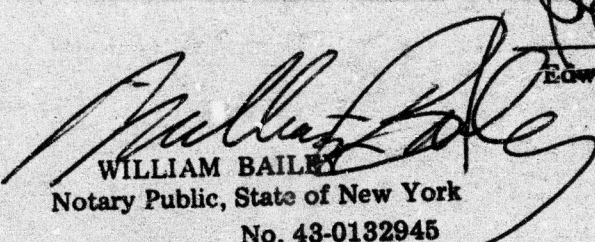
EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 19 day of Sept. 1977 at No. 225 Cadman Plaza East, Brooklyn, NY

deponent served the within Reply Brief
upon U.S. Atty., Eastern District of New York

the Appellee herein, by delivering 3 true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Appellee therein.

Sworn to before me this
19 day of Sept. 1977.


Edward Bailey


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1978

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BOND

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